IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL REVN. APPLICATION NO.419 OF 2005

Gundoji Gangaram Zingade .. ..Applicant

Versus

1. The State of Maharashtra

2. Abdul Hakim Abdul Aziz Shaikh ..Respondents

Mr.Manohar N. Kondalkar i/b Shreeram Shirsat for applicant

Mr.Y.M.Nakhwa, APP for Respondent no.1

Mr.I.a. Shaikh, for respondent no.2

CORAM : S.C.DHARMADHIKARI,J.

DATE : 20TH NOVEMBER, 2006

P.C.:

1. Rule. Heard forthwith by consent.

2. The applicant is the original complainant. He has filed the present revision application invoking the jurisdiction of this court to challenge the order passed

by the Addl. Sessions Judge, Court Room No.2, Sewree, Mumbai on 16.8.2005 discharging respondent no.2 from Sessions Case No.58/1993.

3. The grievance of the applicant is that Sessions Case No.58/93 was committed to the Court of Sessions on 5.1.1993. In all four accused stood trial. The Sessions Case resulted in conviction of accused nos.1 and 2 whereas the accused no.3 was acquitted.

4. At the trial of this Sessions Case the respondent no.2-original accused no.4 was not appearing. He was shown as an absconding accused. The charge was under Sections 324, 326, 307 read with 34 of IPC. Later on respondent no.2 surrendered to the custody and separate trial was ordered as against him. The Accused (respondent no.2) was aware of all these aspects and yet, applied for discharge. The application for discharge was filed on 17.6.2005. The application itself proceeded on the basis that the witnesses had not attributed any role to the respondent no.2. Even his presence at the incident is doubtful. A reference to the statement of the applicant-original complainant before me and other witnesses was made in the discharge application itself.

Reference was also made to all other materials collected during the course of the investigation, including the recoveries and the panchanama. It is in this backdrop that Respondent no.2 applied for discharge. This application was opposed by the prosecution. It pointed out that the discharge application was not maintainable. It also pointed that the respondent no.2 was absconding.

5. This application for discharge was placed before the learned Addl. Sessions Judge and after hearing both sides the Addl. Sessions Judge delivered the impugned order. In para 4 of his order the learned Judge records that the accused no.4 is shown as an absconding accused and a non-bailable warrant was issued against him. The learned judge appears to have been influenced by the fact that during the course of investigation the respondent no.2 was not shown as an absconding accused by the prosecution but later on he was shown as an absconding accused. The learned Judge was really not called upon to comment as to whether the applicant (respondent no.2 before me) was rightly shown as an absconding accused or whether there is any justification for separating his case at the trial. Those are not matters which ought to have influenced the learned Judge while considering the

discharge application. The learned judge also comments upon the surrender of the applicant. The learned judge in para 6 and 7 of the impugned order observed thus :

> (6) Now we have to see when investigation was completed including about this applicant then to what extent prosecution can go? No doubt number of the witnesses have mentioned the presence of this applicants but if perused the police statements of the concern witnesses and see the gravity, we find complainant in his complaint has stated in para 2 of the complaint that, he knows all accused including applicant and in last para and in above para also he states that, present applicant also participated in the beating with other accused. Victims Sidram brother of the complainant in his police statement in line 8 and 9 from bottom states that, at that time present applicant has also taken part in beating. The wife of Gundoji who is one of the star witness is not naming this applicant at all. In the panchanama dated 5.12.90 presency of this applicant shown with others on the point of voluntarily statement and it reveals that, nothing

was recovered from this applicant though shown recovered from accused no.1 to 3. As far as one of the witness Memuna in her police statement has stated that, with two other accused present accused helped in beating like reference made by Chinalya. Gundoji has also referred the applicant saying that, he was knowing him with others and that is all. No other things are described except than above by any of the witness before police.

(7) And when it is not in the police statement, question arise whether above police statements reference is sufficient to charge this applicant? It is matter of record that, these witnesses cannot states more than that what is recorded in their police statement. Posting for moment evidence is record of the witness and when they have not described the act of the present more than that, question arises whether it is sufficient to charge the present applicant? Whether simply presency of the applicant as mentioned above is sufficient to frame charge against him?

6. In my view, the learned judge has clearly lost sight of the fact that he was not holding a Mini-Trial. He was considering an application made under Section 227 of the Code of Criminal Procedure, which provides for discharge. The learned Judge ought to have been further aware of the powers of the court while considering such an application. The learned judge was obliged to hold that there is no sufficient ground for proceeding against the accused and for reasons to be recorded by him he is entitled to be discharged. The learned Judge in the impugned order has not made any reference to this crucial aspect of the matter. The learned judge was not called upon to decide at the stage at which the matter was, as to whether any contradiction or discrepancy in the statement of the material witnesses would make their version at the trial wholly unreliable and untrustworthy. When the learned judge himself has observed that wintesses have spoken about the presence of the Accused at the time of the offence then it was his plain duty to proceed with the matter. More so, in the peculiar facts of the present case where a sessions case has resulted in conviction of two accused. The learned judge in para 8 of the impugned judgment has relied upon the observations made by the court while granting bail to the co-accused. That order

could not have been relied upon in the case of Accused no.4 because admittedly the trial was complete in the case of the co-accused and ended in conviction of some of them.

7. In my view, the order passed by the learned Addl. Sessions Judge discloses total non-application of mind. The learned judge unmindful of the jurisdiction and powers while deciding an application for discharge has gone ahead and recorded a judgment of acquittal at that stage itself. That in the facts of the present case was clearly impermissible in law.

8. I have perused the discharge application and the annexures thereto with the assistance of both sides. The matter was listed for hearing and final disposal at the admission stage itself and both sides have been heard at length.

9. The learned advocate appearing for 2nd respondent found it difficult to support the reasoning of the learned Judge.

10. In the result, I am of the view that the learned Judge clearly exceeded his jurisdiction while deciding the

discharge application. At that stage it is not permissible for the court to go into the materials in full details. The judgment therefore has resulted in manifest injustice and I would be failing in my duty if I do not interfere with the same.

11. Hence, the revision application succeeds. Rule is made absolute in terms of prayer clause (a). The learned judge has already separated the trial in so far as respondent no.2 original accused no.4. He shall proceed with the same in accordance with law. Since the sessions case is pending since 1993, the Addl. Sessions Judge to whom the same is assigned shall endeavour to dispose of the same as expeditiously as possible and in any event within a period of six months from today.

12. This order does not prevent the accused from rasing all contentions as are permissible in law. All contentions of both sides on merits are kept open.

(S.C.Dharmadhikari, J.)